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No. 892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

IDA MAE PALMER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdictional Statement	2
Questions Presented	2
Constitutional Provisions	3
Statutes Involved	3
Statement of the Case	4
Reasons Relied on for Allowance of Writ:	
As to abuses of "informer's privilege"	9
As to illegality of entry, search, seizure and arrest	9
Conclusion	18
Appendices:	
Appendix A—Opinion of District of Columbia Court of Appeals	19
Appendix B—Denial of Petition for allowance of review	24
Appendix C—Denial of petition for reconsideration	25

AUTHORITIES CITED

Beck v. Ohio, (1963) 175 Ohio St. 73, 32 L Week 3235	11
Costello v. United States, (9 Cir., 1962) 298 F 2d 99	11
Gatewood v. United States, (DC Cir., 1853) 209 F 2d 789, 791	13
Giordenello v. United States, (1958) 357 U.S. 480	17
Jones v. United States, (1960) 362 U.S. 257	11
Jones v. United States, (1959) 271 F 2d 494	12
Miller v. United States, (1958) 357 U.S. 301	15, 17
Roviaro v. United States, (1957) 353 U.S. 53	10
Scher v. United States, (1938), 305 U.S. 251	10

Page

United States v. Keown, (D.C.W.D., Ky., 1937) 19 f. Supp 639 10
United States v. Li Fat Tong, (2 Cir., 1945) 152 F 2d 650 10
United States v. Pearce, (7 Cir., 1960) 275 F 2d 318 11
United States v. Rugendorf, (7 Cir., 1963) 316 F 2d 589 11
United States v. Whiting, (4 Cir., 1962) 311 F 2d 191, 196 11
Wilson v. United States, (3 Cir., 1932) 59 F 2d 390 10
Wong Sun v. United States, (1963) 371 U.S. 471 ..... 15, 16, 17

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To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Ida Mae Palmer, respectfully prays that a Writ of Certiorari be issued to review a certain judgment of the United States Court of Appeals for the District of Columbia Circuit that was entered on December 11, 1963. The said judgment of the Circuit Court denied the petitioner an allowance of appeal to review a judgment of the District of Columbia Court of Appeals that affirmed her conviction by the District of Columbia Court of General Sessions for violation of a statute concerning use of a home for illegal keeping or selling of narcotic drugs. (Title 33, Section 416, D. C. Code, 1961)

OPINIONS BELOW

There was no opinion delivered by the trial court (District of Columbia Court of General Sessions); only a verdict of "guilty". The opinion of the District of Columbia Court of Appeals that affirmed the conviction was rendered on July 22; 1962 and is reported at 192 A2d 801-804. The United States Court of Appeals for the District of Columbia Circuit did not render a written opinion in denying review. (See appendix "B" & "C")

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was entered on December 11, 1963. An order was entered on January 15, 1964, by the Circuit Court, denying petitioner's request for reconsideration of the Order of December 11, 1963.

On February 15, 1964, Chief Justice Warren, Supreme Court of the United States, signed an order extending the petitioner's time for filing petition for Writ of Certiorari in this case to and including March 5, 1964.

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code and Rule 37(c) of the Federal Rule of Criminal Procedure.

QUESTIONS PRESENTED

-1-

In a case where one is charged with an offense arising from the presence of drugs in their home that are found and seized by the police when they enter because of a "tip" from an informant that a person for whom they have an arrest warrant is there, can the Court properly refuse to compel divulgence of the informer's identity

where the same is necessary to a proper assertion of rights under the Fourth Amendment in proceedings seeking to suppress the seizure.

-2-

Do lawful grounds exist to justify the forceful entry into petitioner's home without a search warrant, when the Officers receive a "tip" from an informer sixteen hours beforehand that a person for whom they have an arrest warrant is there, when the Officers made no attempt to obtain a warrant and when upon going there are not admitted and a person is seen to hastily leave the door after they knock and make an announcement.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTES INVOLVED

Title 33, Section 416 of the District of Columbia Code, 1961 Edition provides as follows:

> "Any store, shop, warehouse, dwelling-house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to be narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance. No person shall keep or maintain such a common nuisance."

Title 33, Section 416a of the District of Columbia Code, 1961 Edition provides in pertinent part as follows:

"(a) The purpose of this section is to protect the public health, welfare, and safety of the people of the District of Columbia by providing safeguards for the people against harmful contact with narcotic drug users who are vagrants within the meaning of this section and to establish, in addition to the Hospital Treatment for Drug Addicts Act for the District of Columbia, further procedures and means for the care and rehabilitation of such narcotic drug users.

"(b) For the purpose of this section—

"(1) the term 'vagrant' shall mean any person who is a narcotic drug user or who has been convicted of a narcotic offense in the District of Columbia or elsewhere and who—

* * * * *

"(B) is found in any place, abode, house, and shed, dwelling, building, structure, vehicle, conveyance, or boat in which any illicit narcotic drugs are kept, found, used, or dispensed . . .

* * * * *

"(g) Any person convicted of being a vagrant under the provisions of this section shall be punished by fine of not more than $500 or imprisonment for not more than one year, or by both such fine and imprisonment."

STATEMENT OF THE CASE

An information was filed in the District of Columbia Court of General Sessions charging that on July 27, 1962, one Joseph V. Jones was a vagrant within the meaning of Title 33, Section 416a of the District of Columbia

Code, 1961 Edition.[1] The information was issued upon the complaint of an officer of the Narcotics Squad of the Metropolitan Police Department. The offense is a misdemeanor.[2]

A warrant for the arrest of Jones was issued by a Judge of the General Session Court for this offense.[3]

On August 8, 1962, Officer David Paul of the Narcotics Squad received a telephone call from an informant that Joseph V. Jones could be found at 1237 Half Street, Southwest, Washington, D.C. this information was received sometime before 4:30 that day (tr 6).[4] No action was taken on this tip until about 8:30 a.m, the next morning, August 9, 1962, when Officer Paul, his partner Thomas Didone, Jr., and another officer went to premises 1237 Half Street. This was the home of the petitioner Ida Mae Palmer. Paul knocked at the door and after he was "refused admittance," the Officers forced the door open and entered.[5]

---

[1] The particular offense charged in the information was that Jones was a vagrant by reason of being a person who was a narcotic drug user and who was in a place where illicit narcotic drugs were found. This information is contained in the Transcript of Record of the District of Columbia Court of Appeals filed herein.

[2] The statute (Title 33, Section 416a(g)) provides that any person convicted of being a vagrant under the Statute shall be punished by fine of not more than $500 or imprisonment for not more than one year, or both.

[3] The Officer's application for the warrant and the warrant itself are also contained in the Transcript of Record of the District of Columbia Court of Appeals.

[4] The Transcript references "(Tr.)" are to the Official Transcript of the Trial Proceedings in the District of Columbia Court of General Sessions on December 7, 1962. The Transcript is found in the Transcript of Record of the District of Columbia Court of Appeals.

[5] Officer Paul's testimony about what took place at the door and the way in which he was refused admittance were given in answer to a question by the petitioner's counsel at the trial:

"A. Well, when I first got there I knocked on the door; and

After the Officers entered the house they immediately ran upstairs and when Officer Paul reached the second floor he saw petitioner standing with her back to an open closet and he saw her make a motion with her right hand toward the closet (tr 23-24), he went into the room, over to the closet and looked in (tr. 24). When Paul looked in the closet he saw a quantity of capsules on the floor and a bag lying there. He picked up the bag, examined it and discovered more capsules.[6]

In another room, the rear bedroom, the Officer saw one William Harrison "hiding behind some furniture."[7]

The petitioner was arrested and charged with keeping and maintaining a common nuisance, that is, a place which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs, or which is used for the illegal keeping of same.[8]

A pre-trial motion was filed by the petitioner to suppress as evidence the contraband that were seized from her house by the Officers. It was claimed therein that

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when a man's voice asked me who was there, I said it was the police and I had an arrest warrant for Joseph Jones. At this time I didn't hear anything else in a verbal way coming out of the house, and the next thing I saw a man's—lower part of a man's body through the Venetian blinds in the front-door window; and when I kept knocking and I again announced I was a police and I had an arrest warrant, I observed the subject turn and run away from the door, and I believed at that point I was refused admittance, that the person was not going to open the door." (Tr. 21-22).

[6] The capsules contained a mixture of heroin, which is a narcotic drug. (Tr. 57).

[7] He was the person who was at the door when the Officer knocked (see footnote 5). He was arrested and charged with vagrancy under Title 33, Section 416a (b) (1) B, as were two other females who were at the premises. These three other arrested persons were tried jointly with the petitioner. All were convicted; but only the petitioner appealed.

[8] Violation of Title 33, Section 416a.

the search and seizure were illegal and in violation of the petitioner's rights under the Fourth Amendment. The motion was heard prior to trial and denied.

At the trial (before the court, without a jury), the petitioner's attorney objected to the introduction of the evidence "on the basis that the evidence was obtained contrary to the petitioner's rights under the Fourth Amendment in that there was an illegal search and seizure and that the evidence was contrary to Title 33, Section 3901 of the District of Columbia Code (sic., Title 18, Section 3109 of the United States Code)" (tr 5).

After the petitioner's attorney was permitted to cross examine Officer Paul on the "right to search" (tr 5), and counsel for the parties had argued the issue of the legality of the entry, search, seizure and arrest (tr 35-46), the evidence was admitted.

During the cross examination of Officer Paul, counsel for the petitioner sought to learn the identity of the informer who had given Officer Paul the information that Joseph V. Jones was at the petitioner's home. This occurred in the following manner:

> "Q. Now, you stated to the Court that you received information to the effect that Joseph V. Jones could be found at 1237 and a half—Half Street; isn't that correct"
>
> "A. Southwest; yes, that's correct.
>
> "Q. And so that means that you received this information at 3:00 o'clock on the day before—at 3:00 or 4:00 o'clock on the day previous to the day you search the premises; isn't that correct"
>
> "A. I did receive this information the day before—
>
> "Q. (Interposing) Yes.
>
> "A. (Continuing)—I went to the premises; yes, sir.
>
> "Q. That's right. And it was before you went off duty; isn't that right?

"A. Yes; I was at the Narcotics Squad Office when I got this information.

"Q. Now, from whom did you get this information?

"MR. SCHAFFNER: I object, Your Honor. He does not have to divulge his confidential informant, unless, the man was—

"MR. MURIEL: . . . I have to establish the informant, Your Honor.

"MR. SCHAFFNER: —unless the man was an active participant in the crime, which he is not in this case, and then it would come within the doctrine established by the Supreme Court in Roviaro; otherwise the Draper decision would apply here.

"MR. MURIEL: Your Honor, I think the Court should have an opportunity to determine whether or not the informer is, in fact, a confidential agent. I don't think that that is before the Court at this time.

BY THE COURT:

"Q. I understand you had an arrest warrant for this man; is that right?

"A. Joseph Vincent Jones; yes, sir.

"THE COURT: Sustain the objection. He is operating on an arrest warrant.

"MR. MURIEL: That is right.

(BY MR. MURIEL)

"Q. Now, would you state to the Court who the informer was that gave you this information?

"A. The information concerning where this man may be located?

"Q. That's correct.

"THE WITNESS: Your Honor, I would rather not do that.

"MR. SCHAFFNER: I object again; it's the same ground.

"THE COURT: Sustain the objection." (tr 6-8)

The petitioner testified in her own behalf to the effect that she lived at 1237 Half Street, Southwest with her

sister (Irene Harrison, who was arrested with her) and her (petitioner's) five children. She said that her sister (Irene) and her husband had stayed at her premises over night on August 8, 1962; Virginia Minor who cared for her children while she works had also spent the night at her home. She said that she did not know that there were any narcotics in her closet at the time of the Officer came into her home; but that she later found out that her husband, a drug user, who was in jail at the time, had left them there.

At the conclusion of the case, the Court found the petitioner guilty and sentenced her to 180 days imprisonment.

REASONS RELIED ON FOR THE ALLOWANCE FOR THE WRIT

-1-

The question regarding the Trial Court's error in not permitting divulgence of the identity of the informer in the proceedings to suppress the evidence in this case is petitioner's graver and important complaint; and should be dealt with first.[1] To show that the acts of the Officers in coming to her home, breaking in, making a search and seizure, and arresting her were unreasonable and not upon adequate probable cause, the petitioner sought the name of the informer who told them that Jones, for whom they had an arrest warrant for a misdemeanor, was at her home. The stated purpose for seeking the name of the informer was to "determine whether or not the informer is, in fact, a confidential agent." (tr 7). The Court refused to permit the disclosure.

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[1] This point was not raised on appeal. Petitioner is not precluded from raising it here. See Rule 52(6), Federal Rules of Criminal Procedure: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

Officer Paul said that the informer's "information has been reliable in the past" (tr 9). This was good enough for the Judge. Probable cause to go to the petitioner's house, force the door, search her home was thus established. It is immediately obvious that a welter of specifics about the reliability, the trustworthiness of the informant and his information were germane and necessary to a proper determination of the question of the reasonableness of the Officers' actions.

In the case of *Roviaro* vs. *United States*, (1957) 353 U. S. 53, this Court declared that the Government will not be permitted to conceal the identity of an informer from the defense where he participated in the charged offense with the accused, and where divulgence would be helpful to the defense. Pertinent to the issue, as it exists in the instant case, this Court said in the *Roviaro* case, by way of further discussion:

> "Most of the federal cases involving this (fairness) limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is an issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication." (353 U. S. 53, 61)

The Court cited with approval four cases explicitly or implicitly supporting this proposition: *Scher* v. *United States*, 1938, 305 U. S. 251, 59 S Ct. 174, 83 L Ed. 151; *United States* v. *Li Fat Tong* (2 Cir. 1945) 152 F 2d 650; *Wilson* v. *United States* (3 Cir., 1932) 59 F 2d 390; *United States* v. *Keown* (D.C.W.D. Ky. 1937) 19 F. Supp. 639.

Since the Rovario case, some Courts have sagely applied its rule so as to compel disclosure of the name of an informer where the matter of his identity or relia-

bility was important and necessary in connection with the issue of probable cause in arrest and searches. *United States* v. *Pearce* (7 Cir., 1960) 275 F2d 318; *Costello* v. *United States* (9 Cir., 1962) 298 F2d 99.

Other Courts have not followed this practice; but have limited the application of *Roviaro* and formulated a new rule that: disclosure of the identity of an informant cannot be compelled in any proceedings in which a search warrant is sought to be invalidated. *United States* vs. *Whiting* (4 Cir., 1962) 311 F2d 191, 196; and *United States* vs. *Rugendorf* (7 Cir., 1963) 316 F2d 589.

Petitioner contends that a rule is wrong that unalterably denies disclosure, without regard, on the one hand, to the presence of other corroborating facts to establish probable cause, or "a substantial basis for crediting the hearsay", as was the case in *Jones* vs. *United States*, 362 U.S. 257. Or, a rule that on the other hand ignores that necessity for disclosure may rest on dictates of justice. This Court has responded to the cry for remedial action and for guides in this problem area. Recently, review has been granted by this Court in two notable cases, one Federal and one State, that directly assail the "new" rule of nondisclosure of the identity of informers where sought and predicated upon necessity in respect of the question of probable cause. *Rugendorf* vs. *United States*, supra, certiorari granted 375 U.S. 812 (1963); and *Beck* v. *Ohio*, (1963) 175 Ohio St. 73, 32L. Week 8235. The Rugendorf case has been briefed and argued. In petitioner's view the judgment of the 7th Circuit, that it was proper for the trial court to refuse disclosure of an informer where the right of disclosure was claimed to be necessary in attacking probable cause for the issuance of a search warrant for petitioner's home, will be reversed. The 7th Circuit rule in that case (also followed in the 4th Circuit (Whiting, supra)) is unfair and makes a mockery of the attempted assertions of

rights under the 4th amendment by utilization of Rule 41 (e) of the Federal Rules of Criminal Procedure. "A person aggrieved by an unlawful search and seizure may move the District Court . . . to suppress for the use of evidence anything (seized) . . . on the ground that . . . (4) that there was not probable cause for believing the existence of the grounds on which the warrant was issued. . . . The judge shall receive evidence on any issue of fact necessary to the decision of the motion."

The essence of the search and seizure question raised at the trial in this case was, did the officers have probable cause to believe that the person for whom they had a warrant was at the petitioner's house. Officer Paul said they went to her house because an informant told him that the person they wanted was there. This information was all that they acted upon. The officers had no personal knowledge. It was material to know how reliable the information was, in order to determine the reasonableness of their actions. The words of Judge Bazelon of the District of Columbia Circuit, spoken in expressing his views for allowing a forma pauperis appeal in the Jones case[1] are noteworthy:

> "To give vitality to the requirement of reliability the law requires, if no probable cause exists without the information from the informer, that his identity be divulged, so that his reliability may be subjected to meaningful judicial scrutiny rather than accepted on a policeman's word." 266 F. 2d 924 at page 929

In view of the action of this Court in granting review in the Rugendorf and Beck Cases, certiorari should be granted in the instant case on this point (about disclosure of an informer's identity on a motion to suppress) and that an ultimate disposition be made herein in accordance with the Court's judgment in those cases.

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[1] *Jones v. United States* 1959 271 F2d 494

II

Even if it be assumed that the trial Court was correct in its ruling denying disclosure of the informer's name, and with the "so called informer" remaining anonymous, if he does exist, still the evidence discloses nothing to justify the original entry. The entry was illegal and all that flowed therefrom, such as the search, the seizure of the contraband and the arrest of the petitioners, was also illegal. Any determination of the legality of the officer's actions in entering the petitioner's home and in searching it, must be measured by the Fourth Amendment prohibition against unreasonable searches and the requirements of probable cause. In this reference, the rule seems to be that, only where an officer has reasonable cause to believe that the person named in a warrant is in the dwelling house of another he does have a right to search the house, and after demand for admittance and notice of his purpose, to break open doors if necessary to justify his search. *Gatewood* v. *United States* (D. C. Cir., 1853) 209 F2d 789, 791, and at footnote 3. See also opinion of District of Columbia Court of Appeals in this case, citing 1 Alexander, The Law of Arrest., sec. 65, P. 411 (1949). By this criterion, the question is did the officers have reasonable cause to believe that Joseph V. Jones was in the petitioner's home on the morning of August 9, 1962 when they went there. The petitioner says no.

A "tip" given by the informer to officer Paul on the afternoon of August 8, 1962 that Joseph V. Jones was at 1837 Half Street, S.W., was inadequate and insufficient to justify a belief, reasonable or otherwise, that Jones was there the next morning when the officers decided to act on the "tip". The basis for the informer's statement that Jones was there, was not shown in the record. Was his information based on hearsay? Did he see Jones there? The officers did not know the ground on which he based

his conclusion, nor did they find out, or make any effort to find out. They acted solely on the informer's word.

Even if it be assumed that Jones was there when the information was given, there is no showing in this record of anything amounting to grounds for believing that he would still be there sixteen (16) hours later. If he had been there on the day before, it is more likely that he was there for a short visit than not.

So, acting on this stale and insufficient information, which certainly could not have, in any view of the definition of "reasonable cause", engendered a belief that Jones was there at the time, the Officers went to the house. It has been shown that the Officers did not have reasonable cause to believe that Jones was in the petitioner's home; nothing that took place after they knocked at the door and announced their reason for being there, constituted a legal basis for the Officers to break in the door and enter by force. The fact that they were denied admission did not give them any rights that they did not have before knocking on the door. Stating their identity and purpose added nothing to the situation. They had no search warrant or other legal process authorizing an excursion into the petitioner's home, thus the right to force entry after demand, statement of purpose and refusal, as given in Title 18, U. S. C. 3109 was not available to them; nor did they have the right to force entry available to them in the case of pursuit of a fleeing felon; nor the right to use force to effect the arrest of one for the commission of a felony. See *Miller* vs. *United States* (1958) 357 U. S. 301. Though they had an arrest warrant for another on a petty charge, this did not per se give them the right to break in the door because they had been refused admission. Refusal alone, cannot and does not, confer rights that do not exist independent thereof. The Officers had no probable cause, or in the language of the rule, no "reasonable cause to believe that

the person named in the warrant" was in the dwelling house of the petitioner. They cannot by knocking on the door and not being admitted say that this gave them rights that they didn't have beforehand. By going to the petitioner's home without legal basis, the officers thus put themselves in a position to extend this illegality by knocking at the door and demanding entrance.

The District of Columbia Court of Appeals in its written opinion in this case found grounds to justify the entry of the officers because a man fled from view after the officers had knocked and made their announcement. According to the Appeals Court "They had reason to believe he was the one they sought to arrest". Significantly, the officers did not say at the trial that they believed the man at the door was Jones. Even if the officers did believe this, was it a reasonable belief? The petitioner says no. Running from a door when an officer identifies himself can hardly establish reasonable grounds for probable cause for a search or an arrest if there was none in the beginning. See *Wong Sun* v *United States* (1963) 371 U.S. 471.

The situation of the petitioner, Toy, in the Wong Sun case, supra, has many interesting parallels to the case at bar. There, Federal narcotic agents had arrested one Hon Way for possession of narcotics. He told the officers that he had bought an ounce of heroin the night before from one known to him only as "Blackie Toy" who was a proprietor of a laundry somewhere on Levenworth Street. The officers did not obtain a warrant. So, without a warrant the officers went to a laundry that was operated by the petitioner Toy, about four hours after having received the tip. A Chinese (narcotics) agent rang the bell. Toy opened the door and the agent told him he was calling for laundry and dry cleaning. Toy told him that he did not open until 8:00 and told the agent to return by then, and started to close the door, whereupon, the

agent showed his badge and said that he was a federal narcotics agent. Toy, immediately "slammed the door and started running" down the hallway through the laundry to his living quarters in the back. The agents broke open the door and pursued Toy into his living quarters, arrested him, and searched the premises. The Circuit Court of Appeals in this Wong Sun case found that there was neither reasonable grounds nor probable cause for Toy's arrest. This Court in the cited opinion agreed with the Court of Appeals and stated that in its view no warrant would have issued for the arrest of Toy on the information then available at the time they knocked at the door. It was specifically stated by the Court:

> "It is conceded that the officers made no attempt to obtain a warrant for Toy's arrest. The simple fact is that on the sparse information at the officers' command, no arrest warrant could have issued consistently with Rules 3 and 4 of the Federal Rules of Criminal Procedure. Giordenello v. United States, 357 US 480, 486, 2 L ed 2d 1503, 1509, 78 S Ct. 1245. The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. Cf. Jones v. United States, 362 US 257, 270, 4 L ed 2d 697, 707, 80 S Ct 725, 78 ALR2d 233. To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy. (371 U. S. at page 401)

The government argued that not withstanding the absence of a warrant and the non-existence of grounds for the issuance of same, that Toy's flight down the hall after learning that the person at the door was a narcotics

agent, adequately corroborated the suspicion against him and justified the officers' action. This Court rejected that contention, citing its earlier holding in *Miller* v. *United States* 357 U.S. 301 and stated in conclusion:

> "A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked. Cf. Henry v. United States, 361 U.S. 98, 104, 4 L ed 2d 134, 139, 80 S Ct 168. That result would have the same essential vice as a proposition we have consistently rejected—that a search unlawful at its inception may be validated by what it turns up. Byars v. United States, 273 U. S. 28, 71 L ed 520, 47 S Ct 248; United States v. Di Re, 332 U.S. 581, 595, 92 L ed 210, 220, 68 S Ct. 222. Thus we conclude that the Court of Appeals' finding that the officers' uninvited entry into Toy's living quarters was unlawful and that the bedroom arrest which followed was likewise unlawful, was fully justified by the evidence." (371 U. S. 471 at page 483)

It is thus seen that the actions of the officers in this case were illegal and against the petitioner's rights under the Fourth Amendment and, this may be pointed out in the following manner:

1. The "tip" of the informer was vague, inadequate and insufficient to establish probable cause. No warrant permitting entry into the petitioner home would have issued thereupon. *Giordenello* v. *United States*, 357 U. S. 480; *Wong Sun* v. *United States*, 371 U. S. 471.

2. The refusal to admit the officers and the so called "flight" of a man from the door added nothing by way of establishment of probable cause that did not then exist. *Wong Sun* v. *United States*, Supra.

CONCLUSION

In the circumstances of this case, police entry into the petitioner's home was shocking and upon the flimsiest of grounds. There was no legal justification for the same. This case represents a flagrant violation of rights under the Fourth Amendment. Review of the lower Court judgments in this case should be had so that the law, concerning the ability of officers to force entry into a home where they have no search warrant, can be clearly spelled out and settled. This Court has not defined the measure of a citizen's rights to be secure in their home under the Fourth Amendment against forced entry by police who have an arrest warrant for one who does not live there.

In any event, this Court should issue a Writ of Certiorari under its seal to the Circuit Court for the District of Columbia and hold further execution of the judgment of the lower court herein in abeyance pending a determination of the Rugendorf and Beck cases that are presently under review and which have a question for consideration that is identical to the one herein about the right of the petitioner to compel disclosure of the identity of an informer when his information to police is relied upon to establish probable cause.

Respectfully submitted,

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3234

IDA MAE PALMER,

Appellant,

v.

UNITED STATES,

Appellee.

Appeal from the District of Columbia
Court of General Sessions

(Argued June 17, 1963 Decided July 22, 1963)

Herbert J. Muriel, III, for appellant.

Barry I. Fredericks, Assistant United States Attorney, with whom *David C. Acheson*, United States Attorney, and *Frank Q. Nebeker* and *Lawrence Schaffner*, Assistant United States Attorneys, were on the brief, for appellee.

Before HOOD, Chief Judge, and QUINN and MYERS, Associate Judges.

MYERS, *Associate Judge:* Appellant was convicted of violating § 33-416, D.C. Code, 1961.[1] She appeals, claiming primarily that it was error to have overruled her motion to suppress certain evidence.

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[1] § 33-416 provides: "Any store, shop, warehouse, dwelling-house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance. No person shall keep or maintain such a common nuisance."

The record reveals that a "reliable informant" telephoned a member of the Metropolitan Police Narcotics Squad one afternoon and said that one Jones, for whom an arrest warrant was outstanding,[2] could be found at 1213 Half Street, S.W., which was appellant's house. No attempt was made to serve the warrant there until about 8:30 a.m. the next day when three members of the Narcotic Squad arrived and knocked on appellant's door. In reply to a man's voice from within, they stated they were police officers with an arrest warrant for Jones. The officers could see through the venetian blinds a man standing inside, near the door. When they repeated that they had an arrest warrant for Jones, they saw the man turn and flee from view. At this point, the officers forced the door and entered the house, running upstairs. Appellant was observed standing with her back blocking an open closet. An officer advised her that he had a warrant for Jones' arrest and walked over and looked into the open closet to see if Jones were hiding there. At this time the officer saw numerous capsules scattered about on the floor of the closet and also a package containing more capsules, all of which were filled with narcotic drugs. A co-defendant, William Harrison, was found in another room hiding behind a chair, but a search of the premises failed to reveal Jones. Appellant was then arrested and together with others was charged with narcotics violations.[3] The trial resulted in their convictions.

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[2] On July 27, 1962, a warrant was issued for the arrest of Joseph V. Jones for violation of § 33-416(a), D.C.Code, 1961, but it could not be served although two attempts previously had been made to locate Jones.

[3] Appellant was tried with co-defendants Virginia Minor and Irene and William Harrison, the latter three being charged with violating § 33-416(a), "Vagrancy-Narcotic drug user." Although also convicted, they have taken no appeals.

The issue before us is a narrow one. Can the delay between the time that the "tip" was received by the police and the time they went to appellant's house to attempt to arrest Jones be held to negate their *bona fide*, reasonable belief that the accused was still in the house?[4] Were the officers merely using the arrest as a means of entry to search a "hangout" of known addicts, a practice that would require reversal?[5]

An officer with a warrant outstanding for the arrest of an individual named therein may enter upon private premises if he has reasonable cause to believe that such party can be found there.[6] In this jurisdiction, an officer must first identify himself and announce why he seeks admission from the occupant of the house. Then if refused the right to entry, he may lawfully break and enter.[7]

The record reveals that this procedure was followed here and the rule respecting the right to entry carefully observed by the police officers. Information from a reliable source placed Jones, wanted for arrest under an outstanding warrant, in appellant's house. The officers identified themselves after knocking at the door and stated the purpose of their visit. Through the window, they saw a man fleeing from view. They had reasonable cause to believe he was the one they sought to arrest. There being no reply to their requests for admission and no voluntary effort by any occupant to open the door to them, they used the necessary force to enter. They

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[4] *Gibson* v. *United States*, 80 U.S.App.D.C. 81, 83, ft.n.5, 149 F.2d 381, 383, ft.n.5; cert. den. *O'Kelley* v. *United States*, 326 U.S. 724; *United States* v. *Joines*, 3rd Cir., 246 F.2d 278; *Monette* v. *Toney*, 119 Miss. 846, 81 So. 593.

[5] *McKnight* v. *United States*, 87 U.S.App.D.C. 151, 183 F.2d 977.

[6] See 1 Alexander, *The Law of Arrest*, Sec. 65, p. 411 (1949).

[7] *Gatewood* v. *United States*, 93 U.S.App.D.C. 226, 209 F.2d 789; *Accarino* v. *United States*, 85 U.S.App.D.C. 394, 179 F.2d 456, 465.

did not start a detailed search of the house by looking into locked cabinets, trunks, or boxes or for secret hiding places, to find illegal drugs. Rather, they were seeking Jones and when on the second floor they encountered appellant shielding the doorway into an open closet, they looked into it to ascertain whether Jones was hiding there. It was then they observed on the closet floor the numerous narcotic capsules; and having witnessed evidence of a crime that was being committed, the officers made an "on view" arrest of appellant for illegally keeping narcotics in her house.[8]

It is settled law that when the search and seizure, and not the arrest, are the real objectives for entry into a dwelling house by police officers and when the use of a valid arrest warrant is mere pretext for, and at most incident to, the intended arrest, the search is not reasonable and is in violation of constitutional rights.[9] Such factors do not exist here. Upon the record, the trial court could reasonably have found that the police were motivated by an intention, in good faith, to locate and arrest Jones at appellant's house. There is no proof that their purpose was to uncover incriminating evidence against appellant and other occupants and that they were using the arrest warrant as a means to that end. This was not a case of police strategy to gain admission by using an arrest warrant in order to search for possible hidden contraband. There had been no prior available opportunity known to the police for the arrest of Jones. Two previous attempts to serve the arrest warrant upon him had failed. The entry of the officers was lawful and when, while trying to find Jones on the premises, they saw the capsules on the floor, in plain view, they could hardly be expected to close their eyes to their existence.

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[8] See 1 Varon, *Searches, Seizures, and Immunities*, p. 195 *et seq.* (1961).

[9] *McKnight* v. *United States*, *supra*, note 5.

Appellant contends that the long delay between the time the police received the information and the time they acted upon it tainted the alleged good faith of the officers in entering her house; that such delay showed the real purpose of the forced admission was to search her dwelling for known addicts under the guise of looking for Jones.

Although all arrest warrants should be served promptly, we find no reasonable grounds in the present case for ruling that delay alone negated the good faith of the officers in coming to appellant's house to arrest Jones so as to justify reversal of her conviction upon evidence obtained there. As far as the record discloses, aside from unwarranted conjecture or unrealistic surmise as to the real reasons, if any, for the delay in attempting to locate and arrest an illusive Jones, the trial judge had a reasonable evidentiary basis in not assigning an ulterior motive to the officers' delay in going to appellant's house. The motion to suppress evidence seized after lawful admission into appellant's house was properly overruled.

No other error being noted respecting the trial of appellant, we rule that evidence obtained under the facts and circumstances of this case was correctly admitted. The conviction of appellant is therefore

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,13 SEPTEMBER TERM, 1963

IDA MAE PALMER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Filed December 11, 1963 Nathan J. Paulson, Clerk

Before: Bazelon, Chief Judge, Bastian, and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of petitioner's petition for allowance of an appeal from the District of Columbia Court of Appeals, of petitioner's brief in support thereof, and of respondent's brief in opposition thereto, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam

Dated: December 11, 1963

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,136 SEPTEMBER TERM, 1963

IDA MAE PALMER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Filed January 15, 1964. Nathan J. Paulson, Clerk

Before: Bazelon, Chief Judge, Bastian, and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of petitioner's petition for reconsideration of this Court's order of December 11, 1963, denying petitioner's petition for allowance of an appeal from the District of Columbia Court of Appeals, it is

ORDERED by the Court that petitioner's petition for reconsideration is hereby denied.

Per Curiam.

Dated: January 15, 1964

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Accarino v. *United States*, 179 F. 2d 456	8
Gatewood v. *United States*, 209 F. 2d 789	8
Gibson v. *United States*, 149 F. 2d 381, certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724	8
Harris v. *United States*, 331 U.S. 145	8
Jones v. *United States*, 262 F. 2d 234, reversed, 362 U.S. 257	8
Jones v. *United States*, 304 F. 2d 381, certiorari denied, 371 U.S. 852	8
Love v. *United States*, 170 F. 2d 32, certiorari denied, 336 U.S. 912	8
Miller v. *United States*, 357 U.S. 301	7
Roviaro v. *United States*, 353 U.S. 53	9
Rugendorf v. *United States*, No. 223, this Term, decided March 30, 1964	9, 10
Scher v. *United States*, 305 U.S. 251	10
State v. *Beck*, 175 Ohio St. 73, 191 N.E. 2d 825, certiorari granted February 17, 1964, No. 696, this Term	9
United States v. *Joines*, 258 F. 2d 471, certiorari denied, 358 U.S. 880	8
Wong Sun v. *United States*, 371 U.S. 471	8

Constitution, statutes, and rule: Page

U.S. Constitution, Fourth Amendment 3
18 U.S.C. 3109 8
District of Columbia Code:
§ 33–416 3
§ 33–416a 4, 6
§ 33–416a(b)(1)(B) 5
§ 33–423 3
Rule 52(b), F.R. Crim. P 9

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 892

IDA MAE PALMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (formerly the Municipal Court of Appeals) (Pet. App. A, pp. 19–23) is reported at 192 A. 2d 801. The *per curiam* order of the United States Court of Appeals for the District of Columbia Circuit denying, without opinion, a petition for allowance of an appeal from the judgment of the District of Columbia Court of Appeals (Pet. App. B, p. 24) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered

on December 11, 1963 (Pet. App. B, p. 24), and a petition for rehearing was denied on January 15, 1964 (Pet. App. C, p. 25). On February 15, 1964, pursuant to a motion filed February 14, the Chief Justice entered an order extending petitioner's time for filing a petition for a writ of certiorari to and including March 5, 1964, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the officers had reasonable cause to believe that the person for whose arrest they had a warrant was in petitioner's house and that admittance had been refused them after their identity and purpose to execute the warrant had been made known, so as to justify their use of force to effect entry.

2. Whether the trial court properly declined to require the government to disclose the identity of a confidential informant who told the police that the person named in the arrest warrant was in petitioner's house.[1]

STATEMENT

On December 7, 1962, after a non-jury trial, petitioner was convicted in the Municipal Court for the District of Columbia (now the Court of General Sessions) of maintaining a common nuisance (defined as a place which is resorted to by narcotic drug addicts

[1] The second question stated was not raised on appeal. Petitioner asks the Court to consider it under the "plain error" principle.

for the purpose of using such drugs or in which such drugs are illegally kept or sold), in violation of Sections 33-416 and 33-423 of the District of Columbia Code (Tr. 1, 72, 79).[2] She was sentenced to 180 days' confinement (Tr. 75). The District of Columbia Court of Appeals affirmed the conviction (Tr. 95-96; Pet. App. A, pp. 19-23), and a petition for allowance of an appeal from the latter judgment was denied by the United States Court of Appeals for the District of Columbia Circuit (Pet. App. B, p. 24).

At the trial, 223 capsules of heroin, discovered in petitioner's home by officers of the Narcotics Squad of the Metropolitan Police Department, were received in evidence over petitioner's objection (Tr. 3-5, 45, 57). The principal errors claimed on appeal—and the only ones now urged—relate to the validity under the Fourth Amendment of the seizure of those narcotics. The evidence pertinent to this issue, as adduced at a hearing on a motion to suppress conducted during the course of the principal trial (Tr. 5-45, 81-83), may be summarized as follows:

Some time prior to 4:30 p.m. on August 8, 1962, officer David Paul of the Narcotics Squad received information from a confidential informant that one Joseph Vincent Jones, for whose arrest on a narcotics charge a warrant had been outstanding since about

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[2] "Tr." refers to the reporter's transcript of the trial proceedings, to which have been appended, consecutively paginated, the papers constituting the remainder of the trial record. It is on file with the Clerk of this Court.

July 30,[3] was at 1237 Half Street, S.W.—petitioner's residence (Tr. 6–9, 20, 21, 49, 58, 89–90). Paul had known the informant for several years and had on numerous prior occasions received information from him which had proved to be correct (Tr. 9). The officer had made two previous unsuccessful efforts to execute the arrest warrant—once at the address listed in the warrant as Jones' residence, where he was told Jones no longer lived, and again at the residence of his mother or mother-in-law, where he had sometimes stayed in the past (Tr. 9–12).

At approximately 8:50 a.m. on the following day, August 9, Paul and two fellow officers of the Narcotics Squad proceeded to the address on Half Street, where Paul knocked on the front door.[4] A male voice from

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[3] Jones was wanted in connection with an information, filed July 27, 1962, charging him with being a narcotic vagrant, in violation of Section 33–416a of the District of Columbia Code (Pet. App. A, p. 20, n. 2).

[4] It does not appear why Paul did not act on his information immediately upon its receipt, though the reason may possibly be inferred from the fact that he ordinarily went off duty at 4:30 p.m. (Tr. 6). (The information from the informant was apparently received late in the afternoon of the 8th, some time between 3 and 4 o'clock (see Tr. 6, 20, 45), though the precise time of its receipt was not definitely fixed.) Although defense counsel, in cross-examining Paul, queried the officer as to whether he thought it reasonable to suppose that Jones would be at the premises in question more than twelve hours after he was reported being there by the informant—a question disallowed by the court on the ground that it was for the court to decide whether the officer had acted reasonably and that counsel should simply "get the facts" (Tr. 20–21)—counsel never asked Paul to state why he did not act more promptly.

A possible explanation for Paul's apparent belief that Jones would still be at the Half Street premises on the 9th is to be

within asked who was there. Paul replied, "the police", and stated that he had a warrant for the arrest of Joseph Jones. The door had glass panels in it, covered by partially closed Venetian blinds. Through the lower part of the blinds Paul and one of the officers who had accompanied him could see a man standing just inside the door. There being no response from the person inside, Paul again knocked and again stated the purpose of his call. At this time the officers observed the man inside turn, run from the doorway, and disappear. The officers, believing that they had been refused admittance, forced the door and entered (Tr. 20–22, 54).

Paul immediately went to the second floor, where, through an open bedroom door, he saw petitioner standing with her back to an open closet, making a motion toward it with her right hand (Tr. 23–24). Entering the room, the officer explained to petitioner that he was looking for Joe Jones, and he inspected the closet to see if Jones was hiding there (Tr. 24–

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found in the officer's prior knowledge and experience concerning these premises. Paul testified (at the trial in chief) that several years prior to the incidents in issue he discovered a fugitive from justice hiding in this house—in petitioner's presence (Tr. 67–68). It is also to be noted that the charge on which Jones was wanted was for being a narcotic vagrant (defined in relevant part as a narcotic drug user who is found in a place where illicit narcotic drugs are kept, used, or dispensed (D.C. Code, § 33–416a(b)(1)(B))). The house on Half Street, it appeared at the trial, was in fact the residence of a narcotic drug addict, John Arthur Palmer, petitioner's husband, though the record does not show that Paul knew this. (Palmer was serving a sentence for a narcotics violation at Occoquan, Virginia, at the time of the discovery of the narcotics in issue (Tr. 61, 63).)

25, 27–28). There was no one in the closet, but the officer noticed on the closet floor, in plain sight, the capsules of heroin in issue, some lying loose and some in a bag (Tr. 25–26). Paul picked up the bag and capsules and, continuing his search for Jones, proceeded to the next room (another bedroom). There, hiding behind some furniture, he found a man whose attire marked him as the person whom the officers had seen earlier at the door (Tr. 26, 29, 33, 54). This individual turned out to be one William Harrison. His wife, Irene, and another person, Virginia Minor, were also found on the premises (Tr. 26, 48, 51, 59).[5] A search of the rest of the house for Jones proved unsuccessful (Tr. 26–27).

Paul, on cross-examination by petitioner's counsel, denied that his purpose in going to the premises was to use the arrest warrant as a pretext for searching petitioner's house; his only objective, he testified, was to effect the arrest of Jones (Tr. 29).

ARGUMENT

1. Petitioner contends that the officers' forced entry of her home was illegal because their information that Jones was in her house was "stale" (Pet. 13–14). Since the house was not Jones' residence, it is argued, the information that he was there on August 8 did not give reasonable cause to believe that he would still be there the next morning.

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[5] The Harrisons and Miss Minor were charged with being narcotic vagrants, in violation of D.C. Code, § 33–416a (see fn. 4, supra, pp. 4–5). They were tried together with petitioner and convicted but did not appeal (Pet. App. A, p. 20, n. 3).

The record does not explain why the officers failed to act on their information the day it was received (see fn. 4, pp. 4–5, *supra*). Though counsel for petitioner had ample opportunity to do so, he made no attempt to elicit from Paul his reasons for waiting until the following morning. There is no occasion, however, to speculate as to the cause of the delay, or to consider the reasonableness of the officers' belief that Jones would still be on the premises the morning of the 9th. For whether or not the officers had "probable cause" to believe Jones inside at the time they arrived at the house, the events which occurred immediately thereafter provided ample grounds for their subsequent forceable entry.

As we have shown (*supra*, pp. 4–5), after the officers knocked, a male voice from within inquired who was there. The officers, who could see the person inside through the partially closed Venetian blinds, identified themselves as policemen and stated that they had a warrant for the arrest of Joseph Jones. After a pause, during which the man inside neither responded nor opened the door, the officers again knocked and again stated their business, only to see the man turn, run, and vanish. At that point, the officers could reasonably conclude that Jones was in the house; that the man who had fled was probably Jones; and that in any case that person had refused them admittance after he had been clearly apprised of their identity and the purpose of their call. In these circumstances it was lawful for the officers to force the door and enter. *Miller* v. *United States*,

357 U.S. 301; *Gibson* v. *United States*, 149 F. 2d 381, 383, n. 5 (C.A.D.C.); certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724; *Accarino* v. *United States*, 179 F. 2d 456, 465 (C.A.D.C.); *Gatewood* v. *United States*, 209 F. 2d 789 (C.A.D.C.). Cf. *Jones* v. *United States*, 262 F. 2d 234 (C.A.D.C.), reversed on other grounds, 362 U.S. 257; *Jones* v. *United States*, 304 F. 2d 381 (C.A.D.C.), certiorari denied, 371 U.S. 852 (same case on remand); 18 U.S.C. 3109.* Later, when officer Paul noticed narcotics lying on the floor of a closet in which he had reason to believe Jones was hiding, he was entirely justified in seizing the contraband. *Harris* v. *United States*, 331 U.S. 145, 154–155; *Love* v. *United States*, 170 F. 2d 32 (C.A. 4), certiorari denied, 336 U.S. 912; *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3), certiorari denied, 358 U.S. 880.

Obviously, if the arrest warrant were used as a mere pretext for searching the house for narcotics, the entry and ensuing search could not be sustained. Here, however, Officer Paul explicitly disclaimed such a purpose (*supra*, p. 6), and there was absolutely no evidence to the contrary. The trial court reasonably found, therefore, as the court of appeals held (Pet. App. A, p. 22), that the officers acted with a bona fide intention to locate and arrest Jones in petitioner's house.

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* *Wong Sun* v. *United States*, 371 U.S. 471, 473–474, 479–484, relied on by petitioner (Pet. 15–17), is plainly distinguishable. In that case the arresting officer had no arrest warrant and initially misstated his identity and the purpose of his call. Here the officers had a warrant and employed no deceit.

2. The trial court sustained the government's objection, based on the informer privilege (see *Roviaro* v. *United States*, 353 U.S. 53, 59; *Rugendorf* v. *United States*, No. 223, this Term, decided March 30, 1964), to a request by petitioner's counsel that Officer Paul identify the confidential informant who told him that Jones was at the house on Half Street (Tr. 6–8; Pet. 7–8). While acknowledging that the point was not raised on appeal (Pet. 9, n. 1), petitioner now urges that this ruling was erroneous (Pet. 9–12), and asks the Court to take cognizance of it under the "plain error" principle (Rule 52(b), F. R. Crim. P.). We submit that the ruling was, in any event, correct.

This case does not involve the validity of a search warrant based in whole or in part on information from a confidential source (see *Rugendorf* v. *United States*, *supra*); or the legality of a search without a warrant, the alleged probable cause for which consists wholly or partially of such information;[1] or an arrest without warrant based on confidential information, followed by an incidental search of the person arrested (see *State* v. *Beck*, 175 Ohio St. 73, 191 N.E. 2d 825 (1963), certiorari granted February 17, 1964, No. 696, this Term (Pet. 11). Here the officers had an undeniably valid arrest warrant, the validity of which, so far as appears, in no way dependend on confidential informa-

[1] As noted in our brief in *Rugendorf*, the decisions are in conflict as to whether, where confidential information is the sole basis for such a search, or an indispensable element of that basis, disclosure of the identity of the informant is required (pp. 40–41, n. 17).

tion. The pertinent confidential information had to do solely with where the person named in the warrant, whom the officers had been unable to locate, could be found. The officers, acting on their informant's "tip" that the person whom they were looking for was at a specified address, went to that address and, when denied admittance after announcing their purpose, entered by force in order to effect the person's arrest. In effecting entry, however, the officers did not rely simply, or even in indispensable part, on their confidential information. Before entering, they obtained firsthand knowledge—the evidence of their own senses—sufficient to justify them in concluding, wholly apart from their confidential information, that the person they were looking for was indeed in the house. See *supra*, pp. 4–5, 7–8.

In these circumstances the well settled rule referred to at pp. 39–40 of our *Rugendorf* brief—that where officers, acting on confidential information, undertake an investigation of their own and thereby obtain sufficient firsthand intelligence to constitute probable cause for a search independently of the initiating information, disclosure of the informant's identity is not required (see *Scher* v. *United States*, 305 U.S. 251, 254, and the other decisions cited at p. 40, n. 16)—is applicable by analogy. In such a situation, since the confidential information is confirmed, or appears to the officers to be confirmed, by the evidence of the officers' own senses, no sound reason exists for departing from the general rule, grounded in considerations of fundamental public policy, permitting the government to preserve the secrecy of its confidential sources of information.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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